Filed 9/29/09 Criswell v. JS Stadium, LLC CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROGER CRISWELL et al.,	
Plaintiffs and Respondents,	G041921
v.	(Super. Ct. No. 07CC01416)
JS STADIUM, LLC et al.,	O PI N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, David C. Velasquez, Judge. Affirmed.

Hart, King & Coldren, Robert S. Coldren, James S. Morse, and Beau M. Chung for Defendants and Appellants.

The Law Offices of Kent G. Mariconda and Kent G. Mariconda for Plaintiffs and Respondents.

Defendants JS Stadium, LLC, Shorecliff LP, Shorecliff Main LP, Huntington BSC Park, LP, and JS Commercial, LLC (the New Owners), appeal from an order denying their petition to compel arbitration with plaintiff Sharon Dana, a resident of their mobile home park.

We affirm. The New Owners have not shown the existence of any arbitration agreement with Dana. Even if they had, compelling arbitration with Dana would create the possibility of inconsistent rulings between the arbitration and this class action brought on behalf of other residents asserting the same claims as Dana.

FACTS

The Complaint

Plaintiffs Roger Criswell, Arminda Criswell, and Golden State Mobile-Home Owners League — Chapter 571, individually and on behalf of similarly situated residents of the Huntington Shorecliffs Mobile Home Park (the park), sued the park's owners and managers in November 2007. The initial named defendants were MMR Family LLC, RFR Family LLC, Northwind Management, Inc., and William C. Mecham (the Prior Owners). Plaintiffs alleged the Prior Owners hired contractors to perform landscaping and other work that directed the flow of rain and irrigation water at their homes, prevented normal drainage, and allowed the water to pool. Plaintiffs asserted negligence and similar causes of action. They also asserted breach of contract claims arising out of a 1986 lease between the Prior Owners and the residents.

Plaintiffs asserted their claims as a class action. They alleged the park had 304 residents and defined a class of residents "who have suffered seepage, moisture and/or drainage problems in and around their homes due to the failure of defendants to maintain [the park] as required under the MRL [Mobile home Residency Law, Civil Code section 798 et seq.], resulting in (1) property damage to their mobilehomes, (2)

accumulation of moisture that has been allowed to stand and breed mold, fungus, and other toxins, and/or (3) damage to their health."

Plaintiffs alleged common issues of fact and law predominated over any individual issues. These common issues included "(a) The rights and duties of the parties under the MRL and/or other applicable law as well as defendants' violation of those laws; [¶] (b) The rights and duties of the parties under contractual agreements between the residents and defendants; [and] [¶] (c) The existence of accumulated moisture in, around, and under residents' coaches due to the wrongful conduct of defendants."

The court allowed plaintiffs to file an amended complaint in December 2008. Plaintiffs added another resident, Dana, as a named plaintiff. Plaintiffs also alleged the Prior Owners sold the park in January 2008 and added the New Owners as named defendants.

The next month, the New Owners filed a cross-complaint against the Criswells and moved to compel arbitration with Dana. They stated Dana had executed a written arbitration agreement covering the complaint's claims. They attached an "Amendment to [the] Lease" dated July 1990, initialed by Dana. The 1990 amendment consisted solely of a three-page arbitration agreement providing that "any dispute between us with respect to the provisions of this agreement and tenancy in the community shall be submitted to arbitration conducted under the provisions of Code of Civil Procedure §§ 1280, et seq."

Plaintiffs opposed the arbitration motion. They contended no arbitration agreement still existed because the prior owners terminated the 1986 lease to which the 1990 amendment pertained, and the New Owners had not alleged they and Dana were still parties to the 1986 lease. They further contended the arbitration agreement was procedurally and substantively unconscionable.

To support these claims, plaintiffs attached a declaration from Sharon Dana.[1] Dana stated she executed the 1986 lease in 1997, the park purported to cancel her 1986 lease in February 2006, she refused to sign the 2006 lease, and the park thereafter imposed upon her a month-to-month tenancy.

Plaintiffs further contended that compelling arbitration with Dana could create a possibility of conflicting rulings on common issues regarding the remaining plaintiffs' claims. They also asserted the arbitration could conflict with rulings in a related action between certain park residents and the Prior Owners concerning the purported termination of the 1986 lease (*Wooten-Schock v. MMR Family LLC* (Super. Ct. Orange County, 2006, No. 06CC00262)) and a separate action arising from rent increases made pursuant to the alleged month-to-month tenancies. (*MMR Family LLC v. Lupo* (Super. Ct. Orange County, 2007, No. 07CC01257).)

The court denied the motion. It found no arbitration agreement existed because the 1990 amendment "applie[d] to the 1986 lease and the 1986 lease was unilaterally terminated by the mobilehome park's former owner."[2] The court further found the arbitration agreement was procedurally and substantively unconscionable and that compelling arbitration with "only some of the members of the instant class may create conflicting rulings on issues common to the other parties in the instant action as well as issues overlapping in the companion cases, primarily the MMR v. Lupo action."

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[1] The Dana declaration was omitted in the original appellate record, but appellant's moved to correct the record to include it. We grant that motion and deny plaintiffs' motion to impose sanctions on the New Owners.

[2] The court made this finding "[a]s to plaintiffs Schock, Bohl and Walker." The New Owners moved to compel arbitration with these individuals in the related case *Wooten-Schock v. MMR Family LLC* (Super. Ct. Orange County, *supra*, No. 06CC00262), which is the subject of the appeal in *Strada v. JS Stadium* (G041915, app. pending). The court's finding and reasoning applies equally to Dana in this case.

DISCUSSION

No Arbitration Agreement Exists Between Dana and New Owners

"'The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. [Citations.] Petitions to compel arbitration are resolved by a summary procedure that allows the parties to submit declarations and other documentary testimony and, at the trial court's discretion, to provide oral testimony. [Citations.] If the facts are undisputed, on appeal we independently review the case to determine whether a valid arbitration agreement exists.'" (*Warfield v. Summerville Senior Living, Inc*. (2007) 158 Cal.App.4th 443, 446-447 (*Warfield*).)

The parties make competing, unsupported factual assertions in their briefs, but no real evidentiary dispute exists. Plaintiffs do not dispute the authenticity of the 1990 amendment the New Owners submitted with the arbitration motion. And the New Owners did not submit any evidence challenging the facts set forth in the Dana declaration. Thus, we will independently determine the existence of the arbitration agreement.

The New Owners fail to meet their burden of showing an arbitration agreement exists between them and Dana. The undisputed evidence shows Dana executed the 1990 amendment containing the arbitration agreement. But the unrebutted Dana declaration shows the Prior Owners purported to terminate the 1986 lease, which the 1990 amendment amended, in 2006 — two years before the New Owners bought the park. This purported termination is in dispute in pending trial court actions. While we express no opinion on the purported termination, it prevents us from assuming in the absence of evidence that the 1986 lease or the 1990 amendment thereto are still in effect. As the moving parties seeking to compel arbitration, the New Owners must show the purported termination was not effective. They have not done so. Because the New Owners have not affirmatively shown an existing arbitration agreement, the court

properly refused to compel arbitration. (See *Warfield*, *supra*, 158 Cal.App.4th at p. 446 [moving party must prove existence of arbitration agreement]; cf. *Brodke v. Alphatec Spine, Inc*. (2008) 160 Cal.App.4th 1569, 1574 [party cannot compel arbitration while denying existence of contract containing arbitration agreement].)

The New Owners do not even claim Dana is still bound by the 1986 lease. They assert the 1986 lease is immaterial because the 1990 amendment is a separate contract. This is absurd. The 1990 amendment is entitled, "AMENDMENT TO LEASE." It provided that its terms are "added to the [1986] Lease . . ." and "[t]his Amendment will become a permanent part of the Lease and will be binding on all persons to whom the Lease is assigned or otherwise transferred in the future."

The New Owners' cited cases do not help their cause. *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, holds an arbitration agreement is "'separable'" from the underlying contract in the sense that a party cannot avoid arbitration by asserting the contract was fraudulently induced — the arbitrator must decide that issue. (*Id*. at p. 402.) *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, holds a party may compel arbitration pursuant to a contract it asserts is voidable. (*Id*. at pp. 1198-1199.) Neither case allows a party to compel arbitration without pleading and proving the existence of the arbitration agreement in question.[3]

The New Owners cannot inject themselves into an arbitration agreement they have not shown still exists by invoking the public policy favoring arbitration. Public

[3] At oral argument, the New Owners' counsel claimed the New Owners were assigned the 1986 lease when they purchased the park. Counsel then recited from pleadings in the related appeal *Strada v. JS Stadium* (G041915, app. pending). Unproven allegations are not evidence of an existing arbitration agreement. And even in their pleadings, the New Owners do not allege they were assigned the 1986 lease — just all "'claims, right, and interests concerning or involving the [park].'" This silence as to the 1986 lease is telling because the Dana declaration states the 1986 lease was terminated before the New Owners purchased the park. The status of that lease remains to be determined in the trial court.

policy "does not come into play . . . until a court has found the parties entered into a valid contract under state law" to arbitrate. (*Metters v. Ralphs Grocery Co*. (2008) 161 Cal.App.4th 696, 701.) The New Owners fail to show any such contract exists, dooming their arbitration claim.[4]

Arbitration Would Create the Possibility of Inconsistent Rulings

Even if the New Owners showed the existence of an arbitration agreement with Dana, the court permissibly declined to compel arbitration due to the possibility of creating inconsistent rulings.

A court need not compel arbitration when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2, subd. (c).) "[T]he proper interpretation and application of section 1281.2, subdivision (c), is a legal question reviewed de novo. [Citations.] If the statute is properly invoked, then we review under the abuse of discretion standard the trial court's decision to refuse to compel arbitration . . . ." (*Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1318 (*Birl*).)

The court correctly found conflicting rulings on common issues would be possible if it compelled arbitration between Dana and the New Owners. Dana is a named plaintiff in this class action brought on behalf of her fellow residents. This litigation arises from the same alleged transaction that would be resolved in the arbitration — in short, the allegedly negligent landscaping and resulting water damage. This raises the possibility of conflicting rulings on common issues of fact and law, including without limitation: (1) what landscaping and other work took place at the park; (2) what

[4] For the same reasons, the court correctly declined to compel judicial reference pursuant to another provision of the 1990 amendment.

contractual, statutory, and common law duties were owed to the residents (including Dana) regarding the work and park maintenance; (3) whether the work or inadequate maintenance caused the water damage and mold; (4) whether the mold caused health problems for the residents (including Dana); and (5) which parties, if any, are at fault — the Prior Owners, the New Owners, the park management, the contractors, or others — and in what degrees. (See *Birl*, *supra*, 172 Cal.App.4th at p. 1322 [conflicting rulings possible where "different triers of fact could reach different conclusions as to which party was at fault, the cause of any injuries, and the apportionment of liability"]; see also *Fitzhugh v. Granada Healthcare and Rehabilitation Center, LLC* (2007) 150 Cal.App.4th 469, 475-476 (*Fitzhugh*) [possibility of conflicting rulings on causation].)

Dana also asserted a breach of contract cause of action in this case, which the New Owners seek to arbitrate. Thus, the possibility of conflicting rulings would also be created between the arbitration and the pending trial court actions concerning the status of the 1986 lease. (*Wooten-Schock v. MMR Family LLC* (Super. Ct. Orange County, *supra*, No. 06CC00262; *MMR Family LLC v. Lupo* (Super. Ct. Orange County, *supra*, No. 07CC01257).)

Given these possibilities of conflicting rulings, the court was well within its discretion to decline to compel arbitration. (See *Birl*, *supra*, 172 Cal.App.4th at p. 1322 [the court "did not misapply the law or abuse its broad discretion in denying the motion to compel arbitration" where conflicting rulings were possible]; see also *Fitzhugh*, *supra*, 150 Cal.App.4th at pp. 475-476 [affirming court's exercise of discretion to deny motion to compel rather than stay arbitration].)

DISPOSITION

The order is affirmed. Plaintiffs shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.